Supreme Court, U.S.
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No. 00-1783

In The

Supreme Court of the United States

ERLING R. KROSBY,

Petitioner,

vs.

HARRELL Z. BROWNING, THE CONTINENTAL INSURANCE COMPANY, KLEBERG & HEAD, SHELBY A. JORDAN & MATTHEW A. ROSENSTEIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents submit that the only issues for which Petitioner has standing are as follows:

1. Did the District Court err in ordering sanctions against Petitioner, including withdrawing his permission to practice *pro hac vice*?

2. Did the Fifth Circuit err in granting Respondents' original and renewed Motions to Dismiss the Appeal, in part, under Rules 3(a)(2) & 6(b)(2)(B), Federal Rules of Appellate Procedure for Petitioner's failure to timely provide "a statement of issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk"?

3. Did the Fifth Circuit err in granting Respondents' motion to strike Petitioner's statement of issues filed late and without leave of court, comprising 16 pages containing 52 issues, which were disjointed ramblings that are difficult, if not impossible to follow?

PARTIES TO THE PROCEEDING

The Parties to the proceeding in the United States Court of Appeals for the Fifth Circuit are as follows:

Erling R. Krosby, Petitioner, acting *pro se;*
Attorney for the Plaintiffs below;

Tor Husjord Shipping, A/S, Erling R. Krosby's client and not a party to the Petition for Certiorari;

Harrell Z. Browning, Respondent;

The Continental Insurance Company, Respondent;

Kleberg & Head, P.C., Respondent;

Shelby A. Jordan, Respondent and Attorney for Harrell Z. Browning and Continental Insurance Company in the United States Court of Appeals for the Fifth Circuit and for Mr. Browning only in the Bankruptcy Court; and

Matthew A. Rosenstein, Respondent and Attorney for Continental Insurance Company only in the Bankruptcy Court, the District Court and the Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Continental Insurance Company is a wholly owned subsidiary of CNA Financial Corporation, a publicly traded corporation. Approximately 85% of the stock of CNA Financial Corporation is owned by Loews Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

ARGUMENT IN OPPOSITION TO CERTIORARI ... 7

I. QUESTION NOS. 13, 17 AND 21, WHICH RELATE TO THE DISTRICT COURT'S SANCTIONS AGAINST PETITIONER, ARE ISSUES WHICH CANNOT BE REACHED WITHOUT OVERTURNING FACT FINDINGS ADVERSE TO THE PETITIONER OR CAUSING THE SUPREME COURT TO BECOME BOGGED DOWN IN COMPLICATED QUESTIONS OF FACT 7

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OR THE LOWER COURTS... 8

III. THE OPINION BELOW IS UNPUBLISHED .. 9

IV. PETITIONER HAS NO STANDING AS TO QUESTION NOS. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 22 & 23 9

V. THE FIFTH CIRCUIT DISMISSED THE APPEAL ON PROCEDURAL GROUNDS WITHOUT REACHING THE MERITS..... 10

CONCLUSION 10

PRAYER..... 11

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 84 L.Ed.2d 518 (1985) 8

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982) 8

United States v. U.S. Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948) 7

United States v. Yellow Cab Co., 338 U.S. 338 (1949) 8

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 8

FEDERAL RULES

Rule 11, Federal Rules of Civil Procedure 2, 8

Rule 52(a), Federal Rules of Civil Procedure 7

Rule 7012, Rules of Bankruptcy Procedure 11

COUNTERSTATEMENT OF THE CASE

Respondents disagree with Petitioner's version of the facts and state the following in order to present accurately what transpired in the Courts below.

Petitioner, Erling Krosby, was not a plaintiff, below, but the attorney for three plaintiffs: (1) a foreign Norwegian corporation, Tor Husjord Shipping, A/S ["THS"]; (2) A.S. Memories, Inc./Marcus Byrd; and (3) Majestic, Ltd., in an unsuccessful adversary proceeding filed in the United States Bankruptcy Court for the Southern District of Texas against a liquidating chapter 11 trustee, Harrell Z. Browning; his bonding company, Continental Insurance Company; and a law firm, Kleberg & Head. Shelby Jordan has represented Mr. Browning at all times and Continental on appeal to the Fifth Circuit. Matthew A. Rosenstein represented Continental in the Bankruptcy Court and on appeal to the District Court. Petitioner is not licensed to practice before the United States District Court for the Southern District of Texas, but was admitted to practice *pro hac vice.*

During the course of the adversary proceeding in the bankruptcy court, the Plaintiffs filed an unsuccessful civil contempt motion against all the Defendants and two of their respective attorneys, Respondents Jordan and Rosenstein. After the bankruptcy court granted summary judgments in favor of Respondents Browning and Kleberg & Head, P.C. [Petitioner's Appendix, P. 70 & 101], and granted Respondent Continental's motion to dismiss for failure to state a claim [Petitioner's Appendix, P. 117], the plaintiffs filed, with Petitioner as their attorney, an unsuccessful motion to recuse the bankruptcy judge and

a petition for writ of mandamus against the bankruptcy judge, which latter petition they later withdrew. The bankruptcy judge denied the recusal motion on procedural grounds. The Plaintiffs then unsuccessfully appealed to the District Court.

A.S. Memories, Inc./Marcus Byrd and Majestic, Ltd. subsequently dismissed their appeal after the District Court entered its *Sua Sponte* Order for Attorney to Show Authority to Represent Client [Tr. No. 56, January 24, 2000]. In that Order, the District Court ordered the Plaintiffs and Tor Husjord individually to appear and further Ordered the Plaintiffs' attorney [Petitioner] to appear and show that he possesses continuing authority to represent his clients. THS continued the prosecution and the appeals to the Fifth Circuit. However, THS has not timely filed a Petition for Certiorari in this Court and no Petition for THS is presently pending.

The District Court subsequently withdrew the reference to the Bankruptcy Court; adopted the Bankruptcy Court's findings of fact and conclusions of law and issued its own findings of fact and conclusions of law, consisting of 34 pages in which the Court detailed the facts of the case and the numerous misrepresentations and violations of Rule 11, F.R.C.P. by Petitioner. [Petitioner's Appendix, P. 6]

According to the District Court's Findings of Fact and Conclusions of Law [Petitioner's Appendix, P. 6], these violations consisted, in part, of frivolous pleadings [P. 18]; filing of 3 amended complaints in bad faith without leave of court for the purpose of harassing Defendants in an attempt to obtain a settlement for Plaintiff,

and were filed without first conducting a reasonable inquiry into the facts of this case or the applicable law [P. 20]; misrepresentation of facts [Pp. 26 & 23]; that Petitioner and his client "continued a frivolous and harassing course of conduct" by their allegations [P. 28]; that Petitioner misrepresented the real party in interest [P. 33]; that "[T]he record demonstrates that Krosby was willing to tell the Court anything to justify Mr. Husjord's failure to appear. Krosby misrepresented his client's location, status, and health condition to avoid the necessity for his appearance" [P. 38]; that Petitioner made misreprentations in his *Pro Hac Vice Motion* [P. 44]; that Petitioner "continued to pursue his frivolous, non-meritorious, and vexatious course of conduct" [P. 40]; that "The Court is led to believe that Krosby may be a 'rogue', acting without any client authority, pursuing a cause of action which has no merit" [P. 47]; that "The allegations in pleadings signed by Krosby and in Krosby's oral representations lacked evidentiary support" [P. 50]; that "Krosby demonstrated his propensity to change the facts or his theories of recovery when errors were pointed out" [P. 35]; "The excuses given by Mr. Krosby for Mr. Husjord's failure to appear were disingenuous at best, morphing from health problems to business problems and back again at each hearing" [P. 56]; "As further example of the frivolous actions and pleadings, Krosby alleged in letters to Continental that the surety bond was invalid, but later filed suit on the same surety bond. Krosby made written demand for a settlement conference and threatened to file suit, seek contempt, and pursue criminal action if Continental did not oblige. Krosby, further alleged that the bankruptcy court had jurisdiction over Continental pursuant to Rule 9025, F.R.B.P., but later asserted in various

pleadings that the bankruptcy court did not have jurisdiction." [P. 28]; "Krosby and his client continued a frivolous and harassing course of conduct by alleging that all defendants and their counsel committed either criminal acts or improper conduct subject to sanctions." [P. 28]; " Krosby's course of conduct as outlined above demonstrates his violation of the Federal Rules of Civil Procedure and of Orders of the Court, his disregard for the Rules of Professional Conduct, and his headlong pursuit of a frivolous lawsuit. For these reasons, the Order Admitting Erling R. Krosby *Pro Hac Vice* should be vacated instanter and his admission to appear in this case revoked." [P. 50]

The District Court entered two separate judgments: (1) permanently enjoining THS and Petitioner, Krosby, who agreed to the injunction in open court, from filing any further action against any of the Defendants or their respective attorneys relating to the subject of the case without first seeking and obtaining permission of the District Court; and (2) dismissing the case for want of prosecution for failure to prosecute and as a sanction for failure to comply with the Federal Rules of Civil Procedure. The attempted appeal of the permanent injunction was not perfected to the Fifth Circuit and the permanent injunction is now final and non-appealable and not reviewable by this Court.

In that Final Judgment [Petitioner's Appendix, P. 65], the District Court also denied the civil contempt motion and entered sanctions against THS and Petitioner, including withdrawing Petitioner's permission to practice *pro hac vice* and awarded sanctions against Petitioner as follows: attorneys fees for Continental Insurance in the

amount of $1,575.00 plus interest; for Harrell Z. Browning in the amount of $1,440.00 plus interest; for Kleberg & Head, P.C. in the amount of $3,995.66, plus interest; and for Matthew A. Rosenstein in the amount of $4,421.38; plus interest. The District Court also Ordered that the Order Admitting Erling R. Krosby *Pro Hac Vice* vacated and that his admission to appear in the case is revoked.

The Final Judgment also awarded monetary sanctions against THS in favor of Continental in the amount of $66,758.00, plus interest; reasonable attorneys in favor of Browning of $72,072.17, plus interest; and attorneys fees and expenses in favor of Kleberg & Head in the amount of $28,239.12.

The Fifth Circuit dismissed Petitioner's and THS's appeal on procedural grounds for failure to comply with basic Federal Rules of Appellate Procedure.

In the case below, the Petitioner relentlessly attacked all the parties and each of their respective attorneys, unsuccessfully sought recusal of the bankruptcy judge and unsuccessfully raised for the first time on appeal at the Fifth Circuit disciplinary action against both the district judge and the bankruptcy judge. [Petitioner's Appendix, P. 2]

Only Petitioner, Erling Krosby, has timely filed a Petition for Certiorari with this Court. The only Orders below for which Petitioner is entitled to file a Petition for Writ of Certiorari are the Orders in Case No. 00-40586 [Petitioner's Appendix, P. 2]: (1) granting the Motion of Harrell Z. Browning, Continental Insurance Co. & Matthew A. Rosenstein to dismiss appeal; (2) granting the Motion of Harrell Z. Browning, Matthew A. Rosenstein &

Continental to strike Appellant's statement of issues and (3) granting Appellees' renewed motion to dismiss appeal. The Fifth Circuit also denied Petitioner's Petition for Rehearing & Petition for Rehearing *En Banc* [Petitioner's Appendix, P. 4]. The remaining orders in that case relate to inappropriate motions raised for the first time on appeal at the Fifth Circuit and were appropriately denied.

REASONS FOR DENYING THE WRIT

The writ should be denied for five (5) reasons:

1. Question Nos. 13, 17 and 21, which relate to the District Court's sanctions against Petitioner, are issues which cannot be reached without overturning fact findings adverse to the Petitioner or causing the Supreme Court to become bogged down in complicated questions of fact.

2. There is no conflict among the Circuit Courts or the lower Courts.

3. The opinion below is unpublished.

4. Petitioner has no standing as to Question Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 22 & 23.

5. The Fifth Circuit dismissed the appeal on procedural grounds without reaching the merits.

ARGUMENT IN OPPOSITION TO CERTIORARI

I. QUESTION NOS. 13, 17 AND 21, WHICH RELATE TO THE DISTRICT COURT'S SANCTIONS AGAINST PETITIONER, ARE ISSUES WHICH CANNOT BE REACHED WITHOUT OVERTURNING FACT FINDINGS ADVERSE TO THE PETITIONER OR CAUSING THE SUPREME COURT TO BECOME BOGGED DOWN IN COMPLICATED QUESTIONS OF FACT.

The District Court entered extensive Findings of Fact to support its Final Judgment for sanctions against Petitioner [Petitioner's Appendix, P. 6]. The District Court found, among other egregious conduct committed by Petitioner, that " . . . the Original, First, Second and Third Amended Complaints were filed in bad faith for the purpose of harassing Defendants in an attempt to obtain a settlement for Plaintiff, and were filed without first conducting a reasonable inquiry into the facts of this case or the applicable law. . . . The Original, First, Second and Third Amended complaints were signed by Krosby, and were used to pursue a course of conduct in which Defendants were forced to hire attorneys and participate in frivolous litigation." [Petitioner's Appendix, P. 20.] "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Rule 52(a), Federal Rules of Civil Procedure. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.,*

333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). This Court held in *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 84 L.Ed.2d 518 (1985):

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). If the [*574] district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); see also *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982)."

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OR THE LOWER COURTS.

This case is fact specific as to Petitioner's sanctionable conduct in this case. The District Court properly applied Rule 11, Federal Rules of Civil Procedure, to enter appropriate sanctions. Petitioner fails to cite any contrary cases or authorities, let alone any other circuit court, involving Rule 11 sanctions under the same or similar facts. The Petition for Writ of Certiorari presents no novel issue and should be denied.

III. THE OPINION BELOW IS UNPUBLISHED.

The judgments and opinions below of the District Court and the United States Court of Appeals for the Fifth Circuit as to Petitioner are not published and are therefore not precedent. Likewise, there is no national importance to the decisions below.

IV. PETITIONER HAS NO STANDING AS TO QUESTION NOS. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 22 & 23.

Petitioner has no individual standing and may not raise Question Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 22 & 23. These are Questions unique to his client that could only be raised only by Tor Husjord Shipping, A/S, not by Petitioner as Tor Husjord Shipping's attorney in his individual capacity. There is no pending Petition for Writ of Certiorari filed by Tor Husjord Shipping, A/S.

Petitioner initially filed a Petition for Writ of Certiorari with the Clerk of this Court on behalf of his client, as well as himself. The Petition was not accepted on behalf of Tor Husjord Shipping A/S because Petitioner is not licensed to practice before this Court. The Petition for Writ of Certiorari for Tor Husjord Shipping, A/S was never re-filed.

Shortly prior to filing the above Petition, Petitioner filed with the Clerk of this Court an application for admission to practice, which was denied because there remains a pending disciplinary proceeding against him before the Pennsylvania State Bar. Petitioner then filed a

motion before this Court for admission *pro hac vice*, which was also denied. Petitioner subsequently filed with the Clerk of this Court a second application for admission, which was also denied.

Now, Petitioner attempts to step into the shoes of his client, Tor Husjord Shipping, A/S, to raise for the first time in this Court on his own behalf his client's Questions as those of his own. However, those Questions are now *res judicata* as to Petitioner's client. Petitioner has no standing to raise these Questions. The Petition for Certiorari should be denied.

V. THE FIFTH CIRCUIT DISMISSED THE APPEAL ON PROCEDURAL GROUNDS WITHOUT REACHING THE MERITS.

Respondents' motion filed with the Fifth Circuit to dismiss the appeal on procedural grounds for failure to timely file a statement of issues was granted without opinion and without reaching the merits of the case. [Petitioner's Appendix, P. 2] The Fifth Circuit also granted Respondents' motion to strike Petitioner's late filed and confusing issues. [Petitioner's Appendix, P. 2] Petitioner fails to complain of the dismissal and the order striking his issues in any of the 23 Questions Presented in his Petition.

CONCLUSION

The District Court's Findings of Fact and Conclusions of Law demonstrates that the case below was totally devoid of merit. Summary judgment was granted against

Petitioner's client as to two of the Respondents and the case dismissed under Rule 7012, Rules of Bankruptcy Procedure as to Respondent Continental. Petitioner's conduct below was such that the District Judge withdrew the reference from the Bankruptcy Court; dismissed the case with prejudice; permanently enjoined Petitioner and his client from filing any further lawsuits against the Respondents without first obtaining the District Court's approval; ordered sanctions against Petitioner, to include withdrawing his permission to practice *pro hac vice* in the Southern District of Texas; and ordered Petitioner to pay attorneys' fees. This case does not present any valid reason why the Petition for Certiorari should be granted.

PRAYER

Respondents pray that the Petition for Certiorari be denied and that they have such other and further relief at law and at equity to which they be justly entitled.

Respectfully submitted,

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